

Lancaster-Fairfield Community Hospital and Bus, Sales, Truck Drivers, Warehousemen and Helpers Local Union 637, affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, AFL-CIO. Case 9-CA-27006

May 31, 1991

DECISION AND ORDER

BY CHAIRMAN STEPHENS AND MEMBERS
CRACRAFT AND DEVANEY

On June 29, 1990, Administrative Law Judge Richard H. Beddow Jr. issued the attached decision. The Respondent filed exceptions and a supporting brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and brief and has decided to affirm the judge's rulings, findings,¹ and conclusions as modified,² and to adopt the recommended Order as modified.

1. The Respondent has excepted, inter alia, to the judge's finding that certain antiunion comments made by its maintenance department supervisors constitute evidence that the Respondent's decisions to reject employee Richard Paxton's September 1989 transfer application and to transfer him to a position in the boiler room in November 1989 were motivated by antiunion animus. In the Respondent's view, the supervisors' statements were protected by Section 8(c) of the Act and therefore could not be used as evidence in any unfair labor practice proceeding. We find it unnecessary

¹ The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enf'd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings. We also find no merit in the Respondent's allegations of bias and prejudice on the part of the judge. Thus, we perceive no evidence that the judge prejudged the case, made prejudicial rulings, or demonstrated a bias against the Respondent in his analysis or discussion of the evidence. Similarly, there is no basis for finding that bias and prejudice exist merely because the judge resolved important factual conflicts in favor of the General Counsel's witnesses. *NLRB v. Pittsburgh Steamship Co.*, 337 U.S. 656, 659 (1949).

In affirming the judge's credibility determinations, we do not adopt his characterization of Vice President Robert Coholich's testimony as "gratuitous." In addition, the judge inappropriately drew an adverse inference from the Respondent's failure to call its former maintenance supervisor, Lee Miller, as one of its witnesses, in view of the fact that the Respondent had Miller replaced shortly after the events at issue in this case.

² We agree with the judge that the Respondent did not consider employee Paxton's qualifications before selecting employee Shonk for the Technician II position in September 1989, and that the Respondent's asserted reliance on Shonk's allegedly superior qualifications was pretextual. Accordingly, we find it unnecessary to pass on the judge's findings that Paxton was "proficient" in the skills required for the Technician II position which he requested and that Shonk had "no experience" in those areas. In addition, and contrary to the judge, we find that the letter from the Respondent's president, McKelvey, to Paxton did not contain an implicit suggestion that Paxton would be given the next transfer.

to pass on this contention. Thus, the judge's finding that the Respondent's asserted reasons for its actions were pretextual, a finding which we adopt, when combined with the timing of the transfer decisions after the Respondent learned of the Union's organizing campaign, Paxton's role as a leading union supporter, and the questionable handling of his first transfer request, provides an independent basis for our determination that the Respondent's actions were unlawfully based on Paxton's union activities. See, e.g., *Shattuck Denn Mining Corp. v. NLRB*, 362 F.2d 466, 470 (9th Cir. 1966); *Wright Line*, 251 NLRB 1083, 1088 fn. 12 (1980), enf'd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982), approved in *NLRB v. Transportation Management Corp.*, 462 U.S. 393 (1983); *Armstrong Rubber Co.*, 283 NLRB 625, 637 (1987). Accordingly, we do not rely on the supervisors' statements in finding that the Respondent's actions violated Section 8(a)(3).³

2. The Respondent has also excepted to the judge's recommendation that Paxton receive backpay at a Technician III level since the date of his transfer to the Respondent's boiler room. We find merit to this exception. The record shows that the Respondent does not distinguish between Technician II and Technician III employees in the assignment of duties. Thus, we find no support for the judge's inference that, because the individual whom Paxton replaced in the boiler room was a Technician III, Paxton was entitled to receive Technician III wages. Progression from a Technician II to a Technician III involves a promotion, which Paxton neither requested nor received. Accordingly, we have modified the judge's recommended remedy and order to eliminate the references to backpay.

AMENDED REMEDY

We shall order that the Respondent offer Richard Paxton immediate transfer to the position to which he requested transfer in September 1989 or, if that position no longer exists, to a substantially equivalent position, without prejudice to his seniority or any other rights and privileges previously enjoyed.

³ Chairman Stephens would hold that Supervisor Miller's action in mid-June 1989 in responding to a complaint from Paxton about a switch from day shift to second shift with an antiunion tirade focused specifically on Paxton and others "who think the Union is going to help you" is relevant to an assessment of Miller's motive in recommending employee Shonk over Paxton for the maintenance position inside the hospital. He also notes that the motive of a supervisor whose recommendation plays a part in an employment decision is imputable to the employer. *JMC Transport v. NLRB*, 776 F.2d 612, 619 (6th Cir. 1985), and cases there cited. Chairman Stephens agrees with his colleagues, however, that even without consideration of the statements by Supervisors Miller and Ebel, the record supports an inference that the Respondent's denial of Paxton's transfer application and its assignment of him to an isolated job in the boiler room were motivated by his role as the chief union organizer in the maintenance department.

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge as modified below and orders that the Respondent, Lancaster-Fairfield Community Hospital, Lancaster, Ohio, its officers, agents, successors, and assigns, shall take the action set forth in the Order as modified.

1. Substitute the following for paragraph 2(a), delete paragraph 2(b), and reletter the subsequent paragraphs.

“(a) Offer Richard Paxton immediate transfer to the inside Technician II General position which he requested in September 1989 or, if that position no longer exists, to a substantially equivalent position, without prejudice to his seniority or any other rights or privileges previously enjoyed.”

2. Substitute the attached notice for that of the administrative law judge.

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

Section 7 of the Act gives employees these rights.

- To organize
- To form, join, or assist any union
- To bargain collectively through representatives of their own choice
- To act Together for other mutual aid or protection
- To choose not To engage in any of these protected concerted activities.

WE WILL NOT deny transfer of otherwise qualified employees or implement transfer of employees to positions different from that which were applied for because of their engaging in activities protected by Section 7 of the Act.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce our employees in the exercise of rights guaranteed them by Section 7 of the Act.

WE WILL offer Richard Paxton immediate transfer to the inside Technician II General position which he requested in September 1989 or, if that position no longer exists, to a substantially equivalent position, without prejudice To his seniority or any other rights and privileges previously enjoyed.

LANCASTER-FAIRFIELD COMMUNITY
HOSPITAL

Mark G. Mehas, Esq., for the General Counsel.

Rick Shaw, Esq., of Washington, D.C. and G. Roger King, Esq., of Columbia, Ohio, for the Respondent.
Rodger Gable, of Zanesville, Ohio, for the Charging Party.

DECISION

STATEMENT OF THE CASE

RICHARD H. BEDDOW JR., Administrative Law Judge. This matter was heard in Lancaster, Ohio, on April 19, 1990. Subsequently, briefs were filed by Respondent and the General Counsel. The proceeding is based on a charge filed November 17, 1989,¹ by Bus, Sales, Truck Drivers, Warehousemen and Helpers Local Union 637, affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, AFL-CIO. The Regional Director's complaint dated January 11, 1990, alleges that Respondent, Lancaster-Fairfield Community Hospital, of Lancaster, Ohio, violated Section 8(a)(1) and (3) of the National Labor Relations Act by failing to award a vacant maintenance position to its employee Richard Paxton on or about September 8, 1989, and by refusing to implement Paxton's transfer to a vacant maintenance position which he successfully bid upon and was awarded, because of his union or other protected concerted activities.

On a review of the entire record in this case and from my observation of the witnesses and their demeanor, I make the following

FINDINGS OF FACT

I. JURISDICTION

Respondent operates a health care institution. It annually receives revenues in excess of \$100,000 and it annually purchases and receives goods and materials valued in excess of \$2000 directly from points outside Ohio. It admits that at all times material it is, it has been an employer engaged in operations affecting commerce within the meaning of Section 2(2), (6), and (7) of the Act. It also admits that the Union is a labor organization within the meaning of Section 2(5) of the Act.

II. THE ALLEGED UNFAIR LABOR PRACTICES

Richard Paxton was hired on August 18, 1983, as a part-time Technician II in the plant engineering department and became a full-time employee approximately a year later, with primary responsibilities as a groundskeeper. He performed these duties until November 1989 when, he was transferred to what had been a Technician III Mechanical position in the hospital boiler room, however, the position he had requested transfer to was an inside Technician II general position. After the transfer to the unexpected position, he continued to receive the same Technician II pay he had been receiving.

Previously, on August 25, Paxton applied for a vacant inside Technician II General position. Respondent's form "Vacant Position Posting Request" specifically stated that a "Person needed to fill position vacated by Roger May," and was signed by Lee Miller, department manager. Employee Paul Shonk was given the job prior to Paxton's interview for the position on September 7. Paxton filed a grievance over his failure to get the job the day following his interview.

¹ All following dates will be in 1989 unless otherwise indicated.

At the time Paxton applied for the vacant Technician II position he was already a Technician II General so no difference in pay was involved, however, the Technician II position for which he applied was an inside position and he wanted to work inside rather than the primary outside work that was involved in the groundskeeper position.

The job denied to Paxton was awarded to Paul Shonk. Paxton was told by Lee Miller, manager of plant maintenance, that the reason was that the other candidate was significantly more experienced and had a better education (some junior college credits). Paxton, however, testified that he had the specific experience required for the inside Technician II job because he regularly performed inside maintenance work, particularly when it was raining or during the winter when there were few groundskeeping duties. Paxton did not have as much formal education as Shonk, but is registered with the Ohio Apprenticeship Council as a maintenance machinist. He also has a certificate of completion of boiler school and a certificate of completion of mediatech training sessions for customer relations classes as well as a certificate of highvac inservice for air conditioning units (the sort of work done on the air conditioning units at the hospital).

Shonk had worked at the hospital for about a year on a part-time basis, 2 or 3 days a week and was admittedly not well versed in all of the various inside tasks involved. For example, on one occasion Shonk left a note² for another employee wherein Shonk stated that he couldn't figure out the fittings needed to hook up an air dryer.

Shonk testified that he sometimes saw Paxton working inside and considered him to be qualified. As noted, Shonk also admitted that he could not perform all the requirement of the Technician II inside job, but explained he could perform to a high degree of proficiency. He further explained that he had no experience in various phases of Respondent's maintenance department, specifically air handler, boilers, and chillers and that he had minor experience in light plumbing, light electrical, and light carpentry work, all areas at which Paxton was proficient.

The Union had started an organizing drive in the late summer of 1988. Paxton was one of the most active supporters, was the president of the local union organizing committee, and was involved in picketing, arranging union meetings, distributing pamphlets and newsletters. He personally passed out approximately 150 union authorization cards. As a result of the organizational drive, representation petitions were filed on April 20, and May 1, 1989, respectively. These petitions are currently pending.

Respondent specifically knew of Paxton's support of the Union as the result of union letter sent in March or April 1989 to Respondent's president which listed the names of individuals on the union organizing committee, including Paxton. Paxton also regularly wore his union jacket with union insignia to work and his immediate supervisor at that time, Lee Miller, was well aware of his union activities.

In early May approximately 2 weeks after Miller had become maintenance supervisor, Miller told Paxton that "they weren't here to get anybody fired; that they could work with the union or without a union." Subsequently, in mid-June, Paxton complained to Miller about a switch from day shift

to second shift. Miller responded with a "tirade" about a UAW auto plant in Wisconsin saying that he had been at the plant and that there were people on the assembly line for 30 years without any formal education and the union had the audacity to have them believe that they could live in a white collar neighborhood with Miller. Miller then threw up his hands and said, "Thank God there is no union in this place. As long as I'm here, there never will be." Miller then pointed his finger in Paxton's face and said, "Mister, you are a fool and the men in the shop are fools to think the Union is going to help you." Paxton responded by telling him, "Mister, you don't call me a fool" and walking out of Miller's office.

Charles Hockman is a Technician IV electrician. He also testified that on two occasions in September Miller brought up the topic of unions with statements to the effect that he didn't like them, they didn't take care of their people, and they were a bad idea.

Shonk, who was a retired Air Force enlisted flight crew member with 21 years of service, worked at several mechanical or maintenance job after his discharge in 1969. His application for the Technician II position, dated August 24 stated that he had 20 years experience in various maintenance capacities, with 10 months experience as a Technician II, part time, and that he desired a full-time position.

His transfer application reflects that he was interviewed August 25 and selected for transfer effective September 1 (the number is written over to reflect a 7). In addition to Miller's approval signature and the date September 1 (again written over to reflect a 7), Miller also signed and dated the bottom corner of the form on August 25, the same day as the interview. No department stamp appears on the document, however, there is a written "OK" with initials not otherwise identified that clearly are not those of Respondent's witnesses, Vice Presidents Robert Coholich and Carol Thomas.

Shonk testified that he learned of his award about a week before Labor day which would be Monday, August 28, when he saw it written on the shop's chalk board, along with the notice of a Technician IV promotion for employee Rob Ruyf, however, that same afternoon it was removed. He then was contacted by Miller who told him that he must get any additional records of previous technical and general schooling. Although Shonk was on the clock, Miller said he could go home immediately and look. Miller further said he wanted the records because he had found out that Paxton was going to file a grievance, and that he did not want the grievance to be validated because he didn't want Paxton working inside.

Paxton was not interviewed until September 7 and was never asked to provide any supplemental materials. Paxton testified that the so called "interview" was only a general conversation about how Miller wanted to know him better and his past experience as a truck driver, and some comments about cross training between departments. Respondent's application form has a blank that provides for the "specific reasons" an applicant is not selected. Paxton's application states he was not selected because the other candidate had "significantly more experience and education"—making him "better suited for the vacancy." Paxton's application was stamped received August 25 by personnel and it also had the same date and Miller signature in the bottom corner.

²This information is reflected, in part, in G.C. Exh. 5 which is hereby received into evidence.

Paxton testified that late in September, Miller met with employee Dave Smith (who independently testified to essentially the same facts), and Paxton and the new Technician IV, Rob Ruyf. Miller said that Ruyf had a communication problem with the other maintenance department employees and that as Paxton and Smith were perceived as leaders, he wanted them to help. Miller went on to say "I would like for you to help me sway the men away from unionism and join the hospital team in a win, win, win situation." Paxton said he needed time to consider it. A couple of days later he told Miller, "all things considered I don't trust you and there is no way I can support you in whatever you want to do in the maintenance department."

Meanwhile a grievance meeting was held regarding the denial of Paxton's transfer request. The grievance was denied by the committee by memo dated October 19. By letter dated November 2. Respondent's president indicated that he had reviewed the decision and said that he agreed with Paxton that his "application for transfer was not handled properly" but that it would not be overruled because there was an objective basis for the decision, i.e., the comparison of formal education and training. He also stated that he was "hopeful that the current vacancy in your department will provide another opportunity."

In November Technician III General, second-shift employee Steve Walck left and Shonk applied for and was given the position effective in February 1990.

Also in early November Paxton learned that the Technician II inside General position was open. He applied for it on November 20, was interviewed by Miller and was awarded the position on November 21, the day after he applied, however, he continued his groundskeeping duties for a couple of weeks (except when weather was bad) until the hospital was able to hire someone to become the new groundskeeper. Meanwhile, Dave Reed moved from his Technician III mechanical position as assistant to Steve Burgess in the boiler room to a position as Technician III General and Paxton was assigned to the boiler room position, still as a Technician II, and was never given the Technician II General position or duties once performed by Roger Mays, that he had expected.

Meanwhile, Miller had been replaced as supervisor by Charles Ebel. Respondent and General Counsel stipulated that Ebel has the same job duties as Miller and replaced Miller in the same position, and I find that although both Miller and Ebel were not directly employed by the Respondent, but by Service Master Corporation, an independent management firm under contract with Respondent, both Miller and Ebel are Respondent's agents.

David Moore is a Technician IV electronics, with 14 years service at the hospital. Moore testified that he was familiar with the various jobs and had served as acting manager of plant engineering in the spring of 1989, until Miller became manager. He testified that he was involved in the formulation of a flow chart first formulated in 1982 (G.C. Exh. 13) which explained the job positions in maintenance. Moore testified that Paxton is now in the position formally held by a Technician III mechanical, Dave Reed, a position in the plumbing and mechanical division of maintenance in the boiler room. (When Reed vacated the position but retained his III level of pay where he is now working.) As Paxton and Moore understood it, the position that Paxton bid on and

was awarded the second time he bid on it, was the Technician II General maintenance position and is supposed to be part of a Technician II General "pool" in the shop.

The Respondent introduced another chart (R. Exh. 11) which purports to be the organizational chart as of October 3, 1989. This list Dave Reed as a Technician III General under Technician IV Rob Ruyf and Paul Shonk as a Technician III mechanical under Technician IV Steve Burgess, however, the III is partially crossed out to make it a II.

Robert Coholich, Respondent's vice president for support services, testified that it was his understanding that Shonk transferred from his Technician II mechanical position on the 1989 chart to the Technician III General position vacated by Steve Walck in November 1989 creating the vacancy for Paxton's November transfer. He also asserts that Rodger Mays' Technician II vacancy had no relevancy to the November job posting as he left in July and his position was filed, however, Respondent job posting of August 21, 1989, for a Technician II position specifically states "person needed to fill position vacated by Rodger Mays." No document reflecting any posting for the November vacancy was introduced or shown to exist.

Coholich testified that after Miller had interviewed both candidates and recommended Shonk, he agreed with Miller and made the actual decision. No documentation regarding dates or bearing Coholich signature or initials was submitted that would tend to corroborate this testimony. Otherwise, I find it to be inconsistent with Respondent's documents containing Miller's signature regarding interviews, and the selection and nonselection of Shonk and Paxton, respectively. It also is inconsistent with the credible testimony of Shonk and Paxton and I conclude that Coholich's testimony should not be credited.

Coholich also gratuitously testified that Shonk was transferred in September to work under Technician IV Steve Burgess (rather than the position held by Roger Mays as specified in Respondent's vacant position posting dated August 21, 1989. This, however, is inconsistent with the testimony that Dave Reed held that position until November, and Shonk's testimony that he did not move to Walck's vacant Technician III General, second-shift position until February 1990, Shonk's testimony reveals some comment about various general Technician II duties but he made no reference to working in the boiler room under Burgess and I find that Coholich is not shown to have any personal knowledge of these events but instead testified in a speculative fashion about generalized situations that would tend to show Respondent's actions in the best possible light. Accordingly, I do not credit his testimony.

On February 2, 1990, Paxton initiated a conversation with Department Manager Ebel about the fact that he was basically doing Dave Reed's old job in the boiler room, which had been a Technician III position. He said he was not performing the duties of a Technician II General that he had bid on and suggested that he should be paid Technician III wages. At one point during the conversation Ebel responded, "Well, the reason why you are over in the boiler room is to keep you out of sight and out of the mind of the administration because they are so goddamn mad at you. After a while when things cool down and I feel it is the appropriate time I'll try and approach them and see about these jobs that you are talking about."

Ebel recalled having such a conversation and telling Paxton "it was probably good he was stationed in the boiler room because he didn't have to have contact with administration." He believes that Paxton said, "out of sight, out of Mind" and that he himself said something to the effect that "its probably good that those you feel are upset with you are not in contact with you."

Finally, Paxton testified that he is isolated in the boiler room and normally doesn't come into contact with more than two or three people a day.

III. DISCUSSION

In a case of this nature, applicable law requires that the General Counsel meet an initial burden of presenting sufficient evidence to support an inference that the employee's union or other protected concerted activity was a motivating factor in the employer's decision to deny his bid to transfer to another job. Here, the record shows that Paxton was one of two principal union activists and that his activities were known to management, especially his immediate supervisor, Maintenance Manager Miller. The unrefuted, credible testimony of Paxton and others shows that Miller overtly expressed his dislike of unions, including one specific occasion when Miller said, "Thank God there is no union in this place. As long as I'm here, there never will be," and then, pointed his finger in Paxton's face and said, "Mister, you are a fool and the men in the shop are fools to think the Union is going to help you."

Shortly thereafter, Miller played the principal role in selecting a candidate other than Paxton for a lateral transfer to a vacant position. The circumstances surrounding this selection process were so questionable, as further discussed below, that Respondent's president McKelvey agreed in his letter of November 2, to Paxton that "your application for transfer was not handled properly."³

I find that the General Counsel has met his initial burden by presenting a prima facie showing, sufficient to show antiunion animus and to support an inference that Paxton's activity in support of the Union was a motivating factor in Respondent's handling of his transfer application, its decision to award the position to someone else, and its subsequent decision to change the nature and duties of the position. Accordingly, the testimony will be discussed and the record evaluated in keeping with the criteria set forth in *Wright Line*, 251 NLRB 1083 (1980), see *NLRB v. Transportation Management Corp.*, 462 U.S. 393 (1983), to consider Respondent's defense and, in the light thereof, whether the General Counsel has carried his overall burden.

Respondent's defense is based on several misplaced contentions, including an argument that Manager Miller had no authority to approve or deny Paxton's transfer, that higher level supervisors, including Vice Presidents Robert Coholich and Carol Thomas, were not shown to have animus relative to their actions in the decision, and that there is no causal

link between Miller's general dislike of unions and the Respondent's decision not to give the transfer to Paxton.

As noted above, Miller had more than a general dislike of unions, he had expressed strong and specific antiunion statements directed specifically at Paxton and these statements are chargeable to the Respondent. Moreover, Miller conducted all pertinent supervisory actions relative to the transfer applications including interviews of candidate and the signing of his approval or disapproval of the transfer request. These actions were accepted by Respondent's other supervisors, even after they clearly were made aware of the irregularities involved in the selection process. Their apparent failure to address these irregularities is inferred to be a management decision to attempt to cover up the improper handling of Paxton's transfer request motivated by Paxton's involvement in union activities. This conclusion is reinforced by management's subsequent decision to effectuate approval of Paxton's second transfer request in such a manner as to deny him the job he was seeking and instead placed him in a boiler room position where he would be severely limited in his contact with most other employees. Moreover, and contrary to Respondent's assertions, the self-serving declarations by Coholich and Thomas denying any relationship between Paxton's union activities and their decisions to endorse Miller's actions is contradicted by the overall record, and I find that management would not have accepted Miller's actions in denying Paxton's transfer application were it not for their tacit support of his actions based on their own displeasure with Paxton's union activities.

Respondent also suggest that the testimony of the General Counsel's witnesses is not credible because three of them filed charges with the Board.

It also asserts that the General Counsel failed to substantiate the context of their conversations with Manager Miller because the General Counsel failed to call Miller as his witness. Clearly, Miller was an agent of the Respondent at all applicable times and apparently still is employed by the management service company under contract with Respondent. The General Counsel had no obligation to call a potentially adverse witness and to the contrary, I find that Respondent's failure to call Miller as its witness support the adverse inference that if called his truthful answers would have confirmed the statements and actions attributed to him by the General Counsel's witnesses. Moreover, the fact that two employee witnesses testified regarding Miller's statements even though no complaint was issued on their own charges is not something that can be evaluated as detrimental to their credibility. To the contrary, their participation in the hearing tends to involve more risk than gain, and here tends to enhance their credibility. Otherwise, the General Counsel's witnesses testified in a forthright and believable manner that stands essentially uncontradicted by any probative evidence to the contrary and I specifically credit their testimony in all respects.

Finally, Respondent asserts that it had a legitimate business reason for its responses to Paxton's transfer requests; however, I find that its continued assertions that the vacant position was given to applicant Shonk rather than Paxton solely because of their respective qualifications is clearly false and pretextual.

The testimony and Respondent's own records show that Miller interviewed Shonk on August 25 and approved his transfer the same day. This approval became public when the

³ McKelvey testified and was asked by Respondent's counsel what he meant by his statement and he asserted that he was only referring to the manner whereby Paxton heard about Shonk's award of the position. I find this testimony to be self-serving, inherently implausible, and inconsistent with the plain language of the written document, especially in view of the same letter's implicit suggestion that Paxton would be given a transfer to the new vacancy in the department.

information was placed on the shop chalk board on August 28, before being removed. Shortly thereafter, Miller told Shonk to go home (on the clock), to get proof of additional qualifications because he had found out that Paxton was going to file a grievance, and that "he did not want the grievance to be validated because he didn't want Paxton working inside."

After Shonk's transfer was approved and after his application was supplemented by additional educational records, Paxton was given a pretextual interview along very general lines, unrelated to the job in question, and he was not asked to nor was he given the opportunity to supplement his records.

Respondent then had the opportunity to redress Miller's actions when Paxton pursued his grievance on the matter, however, vice presidents Coholich and Thomas refused to acknowledge the impropriety of Miller's selection and endorsed a "cover up" rational based on subsequently acquired information assertedly indicative of better qualification.

I find it unnecessary to rely on any further analysis of the comparative qualifications because the critical decision was made prior to any belated attempt to rationalize the selection as one based on something other than one motivated by a desired to keep union support Paxton from getting a lateral transfer to a position inside the hospital. However, it appears that Shonk's experience and educational background is somewhat irrelevant to the Technician II General position involved. Clearly, his limited, part-time experience on the job would not in fact be "significant" or make him "better suited for the vacancy," as compared with Paxton's training, his 6 years of practical experience and his recognized success and skills at handling the various jobs involved in the regular inside Technician II General position. Accordingly, I find Respondent's endorsement of the rejection of Paxton's transfer because the other candidate had "significantly more experience and education"—making him "better suited for the vacancy," is so overblown and unjustified as to be further evidence of the pretextual nature of Respondent asserted reasons.

The record also shows that a series of personal changes were made in November with Technician III General, second-shift employee Steve Walck leaving and Shonk being awarded a transfer to that position. Paxton had been alerted in the November 2 letter from Respondent's president that there was a current vacancy in his department. He then applied for a "Technician II inside shop" position (no evidence of any specific job posting description was placed in the record). Miller promptly interviewed Paxton and approved his selection for transfer, however, there is no indication that anything was ever said about the vacant positions being in the boiler room or that the position would be Technician II mechanical rather than Technician II General. Contemporaneously, David Reed was moved from his Technician III mechanical position to an apparently new Technician III General position and, after several weeks while Paxton continued outside groundskeeping duties pending the hiring of a replacement, Paxton was placed inside and assigned to perform boiler room duties as assistant to Technician IV mechanical, Steve Burgess.

It is clear from these circumstances that the November vacancy was the same vacancy that Paxton had applied for in August (that was improperly awarded to Shonk), and that it

became open again when Shonk was given a transfer to Walck's second-shift Technician III General position.

Although, Vice President Coholich presented an organizational chart dated October 3, 1989, which could allow a different interpretation, I find this chart to be unreliable and I am not persuaded that it existed when the involved personnel action was taken or that it played any role in defining or determining the personnel moves otherwise discussed.

In substance, Reed moved from his Technician III mechanical (in the boiler room) to a Technician III General position, same pay in September 1989. At some unknown time Shonk's name was placed on Coholich's chart in the mechanical position formerly held by Reed but Shonk did not testify about any work in the boiler room (he has no boiler experience) and testified that since February 1990 he holds a Technician III General position on the second-shift. Paxton applied again for the vacant Technician II General position, inside, but was placed in the boiler room position formally held by Reed, and paid at a Technician II level.

When Paxton subsequently confronted new department manager, Charles Ebel. Ebel said, "Well, the reason why you are over in the boiler room is to keep you out of sight and out of the mind of the administration because they are so goddamn mad at you. After a while when things cool down and I feel it is the appropriate time I'll try and approach them and see about these jobs that you are talking about."

Ebel candidly admitted having a conversation where something similar was said and I fully credit Paxton's testimony in this respect.

Under these circumstances, it is clear that some of Respondent's supervisors other than the departed Miller, continued to be "mad" at Paxton because of his union involvement. It also is clear that despite any rationalization by Respondent regarding alleged business reasons for its placement and the assignment of duties to employees, the assignment of Paxton to the boiler room was motivated by a desire to camouflage its earlier discrimination against him by making it appear that it was granting approval to his requested transfer. At the same time, however, it attempted to isolate him from contact with other employees until the union activities at the facility dissipated and this action also discriminated against Paxton.

Accordingly, I find that the Respondent has failed to show that its actions regarding Paxton's job transfers were supported by legitimate business reasons. I further conclude that the General Counsel otherwise has met his overall burden of proof and I find that by denying Paxton's transfer request on September 8, 1989, and by failing to implement a purported transfer on November 21, 1989, to the job applied for, because of Paxton's protected activities on behalf of the Union, Respondent has violated Section 8(a)(1) and (3) of the Act as alleged.

CONCLUSIONS OF LAW

1. Respondent is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.
2. The Union is a labor organization within the meaning of Section 2(5) of the Act.
3. By denying employee Richard Paxton's transfer request on September 6, 1989, and by failing to implement a transfer on November 21, 1989, to the appropriate position, Respond-

ent engaged in unfair labor practices in violation of Section 8(a)(1) and (3) of the Act.

THE REMEDY

Having found that Respondent has engaged in unfair labor practices, it is recommended that the Respondent be ordered to cease and desist therefrom and to take the affirmative action described below which is designed to effectuate the policies of the Act.

With respect to the necessary affirmative action, it is recommended that Respondent be ordered to offer Richard Paxton reassignment in a position with inside day shift, Technician II General duties (as distinguished from nominal Technician mechanical duties assignment in the boiler room), with seniority or other rights and privileges retroactive to September 1, 1989, and make him whole for any loss of earnings he may have suffered because of the discrimination practiced against him by payment of a sum of money equal to that which a Technician III normally would have earned for the dates he was discriminatorily placed with duties as a Technician III mechanic (boiler room) position to the date of reassignment, with interest as computed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).⁴

Otherwise, it is not considered to be necessary that a broad order be issued.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended⁵

ORDER

The Respondent, Lancaster-Fairfield Community Hospital, Lancaster, Ohio, its officers, agents, successors, and assigns, shall

1. Cease and desist from

⁴Under *New Horizons*, interest is computed at the "short-term Federal rate" for the underpayment of taxes as set out in the 1986 amendment to 26 § U.S.C. 6621.

⁵If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

(a) Denying transfer of otherwise qualified employees or implementing transfer of employees to positions different from that which were applied for because of their engaging in activities protected by Section 7 of the Act.

(b) In any like or related manner interfering with, restraining, or coercing its employees in the exercise of rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Offer Richard Paxton reassignment to inside, day-shift Technician II General duties and make him whole for any loss of earnings he may have suffered while performing Technician III mechanical (boiler room) duties without receiving an appropriate increase from Technician II compensation, losses incurred as a result of the discrimination against him, in the manner specified in the remedy section above.

(b) Preserve and, on request, make available to the Board or its agents for examination and copying, all records, reports, and other documents necessary to analyze the amount of backpay due under the terms of this decision.

(c) Post at its Lancaster, Ohio facility, copies of the attached Notice marked "Appendix."⁶ Copies of the notice, on forms provided by the Regional Director for Region 9, after being duly signed by an authorized representative of Respondent, shall be posted by Respondent immediately upon receipt thereof and be maintained by it for 60 consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by Respondent to ensure that said notices are not altered, defaced or covered by any other material.

(d) Notify the Regional Director in writing 20 days from the date of this Order, what steps the Respondent has taken to comply.

⁶If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."